82-344

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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UNITED OIL MANUFACTURING CO., INC.
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD
*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Was the unlawful conduct of the Petitioner sufficiently pervasive and irremediable by traditional means to warrant imposition of the extraordinary bargaining order remedy?

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## II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 672 F. 2d 1208 (3rd Cir., 1982) and is reproduced in slip-opinion form as Appendix A to this Petition.

The opinion of the United States Court of appeals for the Third Circuit en banc denying the petition for rehearing, is not yet officially reported, and is reproduced as Appendix C to this Petition.

## III. STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was issued on April 19, 1982 (App. B). The denial of the petition for rehearing before the United States Court of Appeals for the Third Circuit en banc was issued on May 17, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

## IV. STATUTES INVOLVED

Section 29 U.S.C. § 157 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

Section 29 U.S.C. § 158 (a) provides in part:

> (a) It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.

## V. STATEMENT OF THE CASE

On December 7, 1979, the Amalgamated Food Employees Union, Local 590 ("Union") filed a charge of Unfair Practices against the United Oil Manufacturing Co., Inc. (Petitioner"),[1] alleging that the Petitioner had committed unfair labor practices in violation of Sections 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §158 (a) (1) and (3) ("Act").

On February 8, 1980, a second charge was filed by the Union alleging violations of Sections 8 (a) (1) and (5) of the Act, 29 U.S.C. §158 (a) (1) and (5). On September 5, 1980, the Administrative Law Judge ("ALJ") issued his decision and recommended Order, finding that the Petitioner committed certain violations of Sections 8 (a) (1) and (3) of the Act, but finding that the Petitioner did not commit any violation of Section 8 (a) (5) and dismissing certain other alleged violations of Sections 8 (a) (1) and (3).

The General Counsel of the Board filed exceptions and the Petitioner submitted cross-exceptions to the ALJ's decision and on March 10, 1981, the Board issued a Decision and Order which impliedly denied the Petitioner's cross-exceptions and sustained the General Counsel's exceptions in part. The Board, contrary to the recommendation of the ALJ, imposed a bargaining order upon the Petitioner under the authority of *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S. Ct. 1918 (1969).

The Petitioner appealed to the Court of Appeals for the Third Circuit which on April 29, 1982, denied the Petitioner's petition for review and granted the Board's cross-application for enforcement of the bargaining order.

The Petitioner then filed a petition for rehearing *en banc* which was denied on May 17, 1982.

The Petitioner now seeks a Writ of Certiorari to review the question raised by the Third Circuit's enforcement of the bargaining order in the instant case.

1. United Oil Manufacturing Co., Inc. is a wholly owned subsidiary of United Refining Co., Inc. of Warren, Pennsylvania. United Refining Co., Inc. is a wholly owned subsidiary of Coral Petroleum, Inc. of Houston, Texas.

## VI. ARGUMENT IN SUPPORT OF THE ISSUANCE OF THE WRIT OF CERTIORARI

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S. Ct. 1918, 23 L.Ed. 2d 547 (1969), the Supreme Court established minimum standards to be met before compelling employers to bargain with unions that had not been selected through N.L.R.B. conducted representation elections. The Court emphasized that elections, not bargaining orders, are the preferred method of assuring employees' free choice of a bargaining representative, 395 U.S. 602, 89 S. Ct. 1934, and bargaining orders should not be issued unless the possibility of ensuring a fair election is slight. 395 U.S. at 614, 89 S. Ct. at 1940. Since that time, the N.L.R.B. and the Circuit Courts have refined, redefined, and, not infrequently, misapplied the *Gissel* standards producing a plethora of inconsistent and disparate decisions.

It is axiomatic that the propriety of a bargaining order is a factual conclusion in every case. No automatic formula can be devised for mechanical application in every case to suggest that, for example, two threats, one coercive interrogation, and the grant of benefits will result in an order while some other combination will not. The N.L.R.B. has been criticized from time to time for its simplistic and mechanical application of general rules in a manner that impairs the employees' free choice in a democratic forum. See *NLRB v. Jamaica Towing, Inc.*, 632 F. 2d 208 (2nd Cir., 1980) and *NLRB v. Appletree Chevrolet, Inc.*, 608 F. 2d 988 (4th Cir., 1979).

The N.L.R.B.'s disregard of *Gissel* restrictions and imposition of bargaining orders when relatively insignificant and almost incidental unfair labor practices occur during an organization campaign, produces frequently inconsistent results in the Circuit Courts, depending more upon the specific court involved and the particular composition of its panel than on the real teachings of *Gissel*. The various Circuit Courts have struggled frequently with difficult issues raised by the Board's demonstrated propensity to treat the issuance of a bargaining order as a routine and

ordinary event rather than as an unusual and extraordinary remedy. See *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F. 2d 503 (7th Cir., 1980); and *NLRB v. Western Drug*, 600 F. 2d 1324 (9th Cir., 1979).

Perhaps the best evidence of this struggle is the battered history of *Gissel* in the Third Circuit. Many split panel decisions have led to a proliferation of *en banc* hearings with inevitably mixed results. See generally, *NLRB v. Permanent Label Corp.*, 657 F. 2d 512 (3rd Cir., 1981), cert. denied _____ U.S. _____, 102 S. Ct. 1432, _____ L. Ed. 2d _____ (1982); *Hedstrom Co. v. NLRB*, 629 F. 2d 305 (3rd Cir., 1980) (Hedstrom II), cert. denied, 450 U.S. 996, 101 S. Ct. 1699, 68 L. Ed. 2d 196 (1981); *NLRB v. Armcor Industries, Inc.*, 588 F. 2d 821 (3rd Cir., 1978) (Armcor II) (unreported per curiam); and *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3rd Cir., 1981); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3rd Cir., 1980); *Electric Products Division of Midland Ross Corp. v. NLRB*, 617 F.2d 977 (3rd Cir., 1980), cert. denied, 449 U.S. 871, 101 S. Ct. 210, 66 L. Ed. 2d 91 (1980); and *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144 (3rd Cir., 1979).

The *Gissel* decision, which was intended to add predictability and stability to an important area of labor law, has utterly failed to achieve its goal in this Circuit.

Indeed, the panels routinely give lip-service to the *Gissel* standards, and proceed to manipulate the standards primarily to achieve the results a given panel majority desires. Judge Gibbons noted recently that it is "no secret" that a significant number of judges on this court have been signalling the Board that *Gissel* bargaining orders "are unwelcome in this circuit" while another group of judges are giving quite a different signal. *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d at 470-471 (dissenting opinion)

The desperate need for further elucidation of the *Gissel* standards is made obvious by the present case, particularly when it is viewed in comparison to the decision of a different panel of the same court in *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460 (3rd Cir., 1981). The two cases, decided approximately one year apart, reach opposite conclusions on facts which are strikingly similar. In both cases, the violations were minimal and rather clearly subject to remedy by traditional methods, leaving selection of a representative also for traditional treatment in a democratic election process. The Court did just that in *K & K* but reached a diametrically opposite result in the instant case behind the pretext of "factual differences" in the cases. Analysis of the cases by any fair-minded observer should establish clearly that, to the extent any differences can be found in the cases, the unfair labor practices in *K & K* were more pervasive and more difficult to remedy than those in the present case.

In neither case, however, is a bargaining order appropriate and the inconsistency in these results emphatically underscores the need to fashion some further definition of the *Gissel* standard and to define the end point beyond which establishment of bargaining order remedies does violence to the very policy underlying the *Gissel* decision. It is respectfully submitted that this case is beyond that limit and presents to the Court a unique opportunity to define minimum standards.

A comparative evaluation of the two cases serves to emphasize this need not only from the standpoint of defining minimum standards to assure reasonably consistent results but also, and perhaps more importantly, because it demonstrates a pattern of conduct on the part of this union which perverts the *Gissel* objectives. Unfortunately, that pattern is not the exclusive province of this Union and is no longer uncommon.

Some attention must be given the procedural development of the two cases involving the same union and the same union organizer in order to understand what is occurring. One inevitably

concludes that, as a matter of organizing tactics, this union *specifically prefers not* to use the judicially favored, conventional, Board conducted election to secure representation rights. Rather, they prefer to engage in recognitional strikes which, if successful, are followed by a subsequent claim that the fair election which has been carefully avoided is "impossible." This pattern of conduct is predicated upon the assumption that the N.L.R.B. will continue to treat bargaining orders as routine rather than extraordinary remedies and that the Courts will routinely enforce them much of the time. The absence of a well-defined minimum standard perpetuates such an assumption. The union achieved its end in this case even though it had not done so with indistinguishable facts in *K & K*.

Specific comparison of the facts will be instructive. As has been stated, both cases involve the same union, the same organizer and very small proposed bargaining units. The alleged violations of Section 8 (a) (1) of the Act (29 U.S.C.A. § 158 (a) (1)) are much the same. In *K & K* promises of substantial benefit improvements were made by the owner of the Company to all fourteen employees. In the instant case, less than one-fourth of the 29 member bargaining unit was affected by a wage increase of literally a few cents per hour, and one employee was "interrogated" *after* he had volunteered information.

Both cases involved fully effective strike activity *after* this allegedly coercive conduct. In both cases, the Union avoided an election. In both cases, the ALJ denied a bargaining order concluding that traditional remedies would suffice to ensure a fair election. Finally, in both cases, the Board rejected this conclusion of the ALJ and entered a bargaining order.

In the Opinion of the Court below, Judge Sloviter dismissed the striking similarities between the cases with barely a mention and concentrated instead on what were termed "significant differences" between the cases. Based on these significant differences, Judge Sloviter rejected *K & K* as controlling precedent and refused to follow the course that the same court had charted

in that decision where the Board's bargaining order was denied enforcement. However, when the "significant differences" are analyzed separately, it becomes evident that they are not only not significant but, for the most part, are not even differences.

The first "significant difference", the ALJ's characterization of the unfair labor practices in *K & K Gourmet Meats* as "minimal" as opposed to the instant case wherein the ALJ characterized the violations as "serious unfair labor practices," clearly is irrelevant to the propriety of a bargaining order. Imposition of a bargaining order does not hinge upon the characterization of the unfair labor practices involved. Rather, bargaining orders are imposed only where the improper conduct is sufficiently egregious to render traditional remedies impotent, or as the Court stated, "*only* in exceptional circumstances, where it is *obvious* that the extensive machinery and power of the NLRB is inadequate to ensure a free election . . ." "*K & K Gourmet Meats, Inc.*, 640 F.2d at 469 (Emphasis added.)

In the instant action, it certainly is not obvious that a free election could not be had. In the eyes of the ALJ who "observed the live testimony of the employee witnesses and [made] a first hand evaluation of the workplace atmosphere" (Slip Op. p. 22), such a course was not only possible, but appropriate.

Judge Van Dusen quite aptly stated in his dissenting opinion (Slip Op. p. 22):

> . . . whatever the ALJ may have meant by the term "serious" he clearly did not mean "sufficient to warrant a bargaining order." To then use the ALJ's subjective language to support a conclusion he himself refused to reach seems to me to be rather anomalous.

The second "significant difference," that in *K & K Gourmet Meats* only two of five unfair labor practices were supported by the record, while the Petitioner in the instant action conceded three of five alleged violations, is also irrelevant. Again, it is

neither the severity nor the number of violations alone that dictates whether a bargaining order should be imposed. Nor is the position of the employer in contesting or not contesting the allegations relevant. Rather, the determining factor must be whether there is a likelihood of a fair election being conducted after the unfair labor practices have been remedied in a traditional fashion. The unfair labor practices found to have been committed by the Petitioner in the instant action would do no more, and probably less, to damage the possibilities of a fair election than would the violations which occurred in *K & K Gourmet Meats.*

In *K & K Gourmet Meats,* the employer made repeated promises to every employee of increased wages, improved insurance benefits, new pension and profit sharing arrangements and other general improvements. The promises were made to all employees and the benefits would affect all employees. The Court concluded that this conduct was subject to adequate remedy through traditional methods. In the present case, the employer interrogated one employee in a relatively innocuous manner not significantly different from the interrogation which was deemed non-coercive and thus not unlawful in *K & K Gourmet Meats,* and the employer here increased the wages of only six out of twenty-nine employees.

In *K & K Gourmet Meats* the Court concluded that the unfair labor practices engaged in by the employer had little if any effect on the employees or the union's majority status as evidenced by the successful strike called after the violations were committed. In the present case, two of the three unfair labor practices occurred prior to a similarly successful strike initiated by the Union. It is, therefore, obvious that the pre-strike activities of petitioner in the instant case, were not sufficient to undermine the strength of the Union and, thus, in accordance with *K & K Gourmet Meats,* no bargaining order should be imposed on the basis of the pre-strike activity of the Petitioner. Describing the conduct which the employer here has not contested as "admitted"

cannot make it more serious than that which was "contested" but found to be a violation in *K & K*.

The only point of distinction in fact between this case and *K & K Gourment Meats* is the third "significant difference" noted by Judge Sloviter, namely, that the present case, unlike *K & K Gourmet Meats*, involves a post-strike violation. Petitioner has not contested the technical violation found in its failure to restore three strikers to overtime benefits previously enjoyed. This distinction is clearly not even relevant insofar as the bargaining order issue is concerned. The ALJ decision makes it quite apparent that the post-strike violation was a virtually inadvertent technical violation which resulted essentially because some strike replacements continued working after the strike. By no stretch of the imagination could this violation, in and of itself, distinguish the present case from *K & K Gourment Meats* for purposes of a bargaining order. Yet, the strong emphasis Judge Sloviter's opinion places on this particular violation makes clear that this is the sole distinction supportive of the bargaining order here.

Judge Sloviter opined that the post-strike violation "clearly demonstrat [ed] to the employees that [United Oil] alone controlled their economic destiny." (Slip Op. p. 11) This conclusion is totally lacking in merit and logic. Any effect the post-strike violation may have had on the employees' idea of who controlled their "economic destiny" would have been completely abrogated by the ALJ's order directing Petitioner to reinstate the employees' overtime. If Petitioner had indeed intended to demonstrate its power over its employees by failing to reinstate the overtime of three employees, that intention could have been thwarted by traditional remedies. By ordering Petitioner to reinstate the employees' overtime, the ALJ could adequately demonstrate to Petitioner's employees that the employer could not control their "economic destiny." Such a remedy would demonstrate quite graphically to the employees that the NLRB, acting on the union's charge, controlled the employer's actions in a very

effective fashion. It must be borne in mind that an election would not be conducted, by NLRB rules, until the employer had posted the required notices and complied with their terms throughout the sixty day posting period. Certainly, the imposition of a bargaining order was neither necessary nor proper in those circumstances.

In sum, the differences between the two cases are so slight and superficial that the cases demand similar treatment and like results. Both are far beyond the scope and intent of *Gissel*, yet a bargaining order issued in the instant case. The *only real difference* is the panel which decided the cases. Such a result is only possible because no clear minimum standard for *Gissel II* type orders has been defined by this Court. A sufficient number of cases have now been decided that the Court can and must extract and define certain more specific criteria for determining the propriety of a bargaining order.

The utter confusion which results from cases such as these is not isolated to the Third Circuit. The same confusion, lack of uniformity and lack of predictability can be found everywhere.

Indeed, by comparison to the present case, a whole host of cases in other Circuits have denied bargaining orders in cases where far more flagrant violations, including discharges and threats of plant closure, have been present. Such violations are far more difficult to remedy by traditional means than the minor conduct involved in the present case. Yet, a sampling from various Circuits makes clear that bargaining orders are frequently found inappropriate in those cases. *See generally, NLRB v. Pace Oldsmobile, Inc.*, 94 LC 13,596, (2nd Cir., May 23, 1982) (21 employees in unit; discharge of pro-union employee; promise of benefits, threats of plant closure, coercive interrogation, and refusal to reinstate three strikers and the discharged employee; propriety of bargaining order not obvious from the facts); *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d 266 (9thCir., 1979) (34 employees in unit; coercive interrogation, threat of economic reprisals, threat of stricter work rules, threat of withholding

contemplated raises and bonuses, promise of economic benefits, creation of open door policy, and threat to prolong negotiations while withholding raises and bonuses; conduct hardly irreparable requiring a bargaining order); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir., 1978) (8 employees in unit; surveillance, soliciting grievances, promising benefits, threatening reprisals, withholding pay increase to pro-union employee and discharge of pro-union employee; record indicates violations fall within *Gissel III* category, therefore no bargaining order); and *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir., 1973) (39 employees in unit; polled employees, repeated interrogation, repeated efforts to have an employee persuade others to defeat union, promise of better benefits, promise of better working conditions, threat of worsened conditions if union wins, and threat of plant closure and/or layoff).

These decisions fairly sample some more egregious conduct deemed insufficient to warrant a bargaining order and highlight the dubious precedential value of the *Gissel* case and its progeny at the Circuit Court level. The checkered pattern of these cases emanates from a lack of guidance by this Court regarding the minimum standard warranting issuance of a bargaining order.

As Judge Van Dusen noted in his dissenting remarks, "While it is fundamental to our common law system that existing precedents be extended to new or different factual situations, there comes a point where to go further is to do violence to the very policy underlying the early decision." (Slip Op. p.24) The patent lack of factual similarity between the present case and *Gissel* and the inherent danger to employee free choice from this decision, demand that the Court draw the line here and effectively place a "bottom" on *Gissel* bargaining orders.

Judge Van Dusen's further observation that the *Gissel* court "never intended its extraordinary remedy to be expanded to the point where it becomes an equally attractive – or, in some cases, more attractive – alternative to a Board election," (Slip Op. p. 24) could not be more poignant.

One cannot read the record in the two cases and remain unconvinced that this union as a matter of policy deliberately avoids the election procedures and seeks to establish its representation status by force. It elicits some relatively minor employer response to its organizational activity, engages in a recognitional strike, claims a fair election is impossible and seeks a bargaining order based on whatever the employer might do, intentionally or inadvertently, in the interim. Such is not the purpose of the *Gissel* doctrine and such should not be its result.

Yet, the bargaining order in this case is a tacit condonation of this calculated avoidance of an election.

In the present case, the Union was rather overt in its callous disregard of employee rights to participate in a Board conducted election. *After* the Board rejected the Union's unit contention and directed an election in a conventional unit, the Union promptly withdrew its petition and filed unfair labor practice charges claiming that the fair election it sought up to that day was impossible because of conduct which had occurred months earlier. The Court simply cannot countenance and tacitly legitimize such a campaign tactic. The bargaining order in this case must be vacated and minimum standards must be defined which realistically confirm that a bargaining order is an extraordinary remedy, not merely a convenient alternative.

## VII. CONCLUSION

For the reasons set forth above, the Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to correct a manifest error in its ruling on the question presented.

Respectfully submitted,

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